

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1907

No. 1077

GEORGE WENDELL PHILLIPS, APPELLANT,

VS.  
FIFTY ASSOCIATES ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MASSACHUSETTS

Filed for record at 10:00 A.M.

1907



(22,023 )

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 797.

GEORGE WENDELL PHILLIPS, APPELLANT,

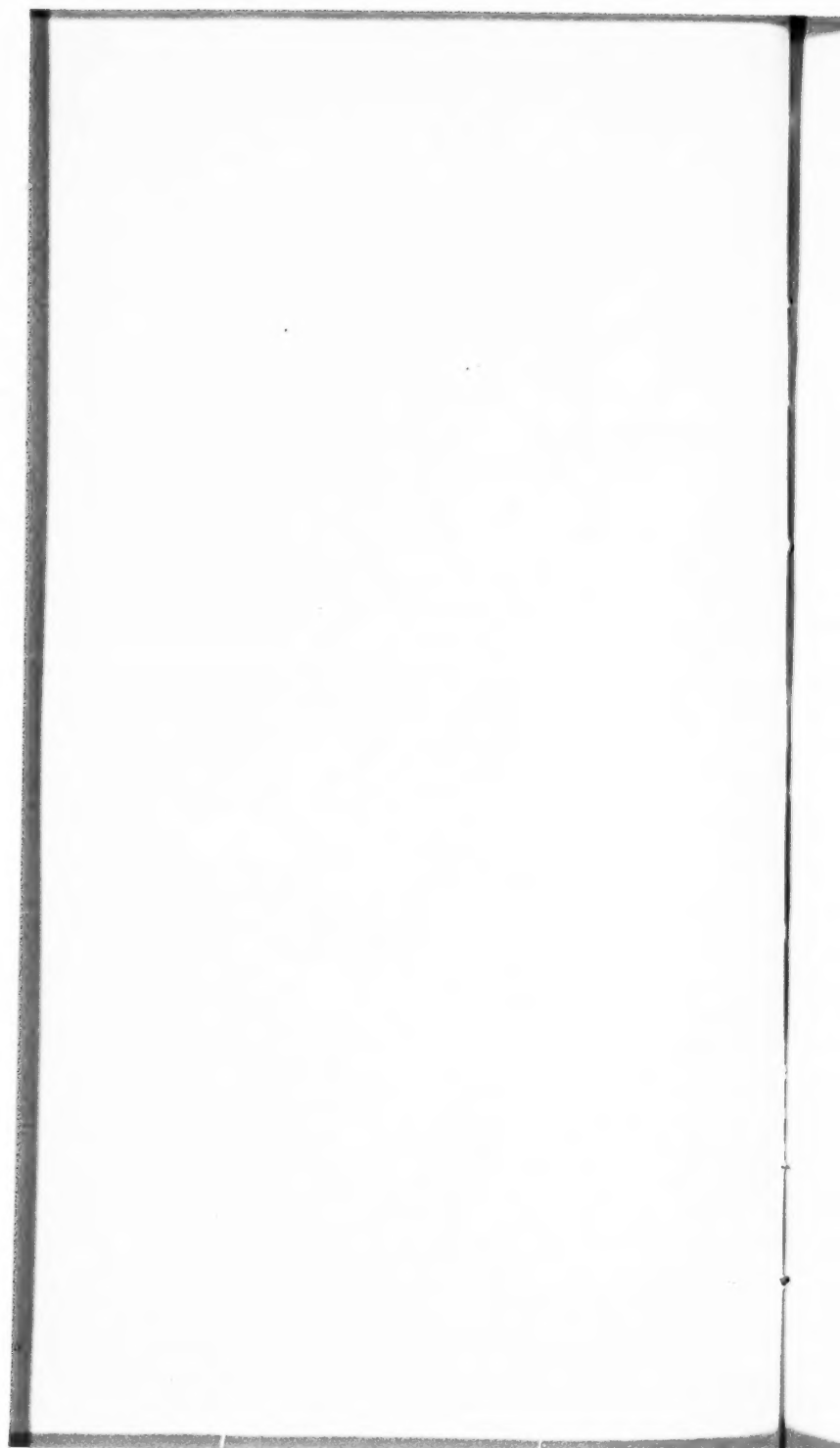
*vs.*

FIFTY ASSOCIATES ET AL.

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THE DISTRICT OF MASSACHUSETTS.

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*Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA,  
*District of Massachusetts, ss:*

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of October, being the nineteenth day of October, in the year of our Lord one thousand nine hundred and nine.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 682, Equity Docket.

GEORGE WENDELL PHILLIPS, Complainant,  
v.  
FIFTY ASSOCIATES et al., Defendants.

The Bill of Complaint in this cause is filed in the clerk's office on the eighth day of February, A. D. 1910, and is duly entered at the present October Term of this Court, A. D. 1909, and is in the words and figures following:

*Bill of Complaint.*

(Filed Feb. 8, 1910.)

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

George Wendell Phillips, of Reno, in the State of Nevada, brings this, his bill of complaint, against the Fifty Associates, a corporation, organized and existing under the laws of the State of Massachusetts, and having its principal office and place of business in Boston, in that State, a citizen of the State of Massachusetts; Charles W. Amory, of said Boston, a citizen of the State of Massachusetts; Charles E. Cotting, of said Boston, a citizen of the State of Massachusetts; Charles F. Adams, 2nd, of Concord, a citizen of the State of Massachusetts; Francis I. Amory, of said Boston, a citizen of the State of Massachusetts; Philip Dexter, of said Boston, a citizen of the State of Massachusetts; and Francis C. Welch, of said Boston, a citizen of the State of Massachusetts.

Your orator complains and says:

(1) That he is a citizen of the State of Nevada and a resident of Reno, in said State, and brings this, his bill of complaint, in behalf of himself and all other shareholders who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit against the Fifty Associates.

(2) That the defendant, Fifty Associates, is a corporation, duly organized and existing under the laws of the State of

Massachusetts, and has its principal office and place of business in the City of Boston, in said State, and is an inhabitant of the District of Massachusetts; that the defendant, Fifty Associates, is managed and controlled by a Board of five (5) Directors, and that its principal executive officers are a President, Clerk and Treasurer, exercising the usual powers and subject to the usual duties and obligations attached to such offices.

(3) That the defendant, Charles W. Amory, is a citizen of the State of Massachusetts and a resident of Boston, within that State and within the District of Massachusetts, and is President and a Director of the defendant, Fifty Associates; that the defendant Charles E. Cotting, is a citizen of the State of Massachusetts and a resident of Boston, within that State and within the District of Massachusetts, and is Treasurer and Clerk of the defendant, Fifty Associates; that the defendant, Charles F. Adams, 2nd, is a citizen of the State of Massachusetts and a resident of Concord, within that State and within the District of Massachusetts, and is a Director of the defendant, Fifty Associates; that the defendants,

4 Francis I. Amory, Philip Dexter and Francis C. Welch, are respectively citizens of the State of Massachusetts, residents of Boston, within that State and within the District of Massachusetts, and are Directors of the defendant, Fifty Associates.

(4) That this suit is one of a civil nature, cognizable in equity; that the suit arises under the Constitution of the United States and under the laws thereof; that the suit is a controversy between citizens of different States and the matter in dispute exceeds, exclusive of interest and costs, a sum or value of \$2000.00; and that the suit arises under the Internal Revenue Laws of the United States.

(5) That the complainant is, and, for more than a year prior to December 31, 1909, was, the owner of one of the shares of the defendant, Fifty Associates; that he, prior to the bringing of this suit, duly requested the defendant, Fifty Associates, and its Directors and Officers, to omit and refuse voluntarily to prepare and file the return hereinafter mentioned, and to refrain from paying the tax hereinafter mentioned, and to contest the constitutionality and applicability of the Act of Congress hereinafter mentioned, purporting to require the defendant, Fifty Associates, to make and file said return and to pay said tax assessed, if any; a copy of said request is hereto annexed and marked "Exhibit A;" thereupon the defendant, Fifty Associates, and its Board of Directors refused to comply with said request and further determined to instruct—and did instruct—the executive officers of said corporation to make and file said return and voluntarily to pay said tax, if any were assessed; a copy of the refusal of the defendant corporation to comply with the complainant's request is hereto annexed and marked "Exhibit B;" and the complainant says that this suit is not a collusive one to confer on a Court of the United States the jurisdiction of a case over which it would not otherwise have cognizance.

5 (6) That the defendant, Fifty Associates, was incorporated by special Act of the Legislature of the Commonwealth of Massachusetts, approved February 21, 1820, under the corporate name of "The Proprietors of Museum Hall"; that said special charter was amended

by special Act of the Legislature of said Commonwealth, approved June 12, 1823, changing the name of said corporation to "Fifty Associates", and granting it generally, among other powers, the following:

"The said corporation is hereby declared and made capable to have, hold and possess real, leasehold or other estate without and beyond their present described limits, with full power to build, improve, alter, pull down and rebuild, and to manage, exchange and dispose of the same, according to the general powers heretofore granted to said corporation."

That the original charter of said Company authorized it to hold a certain parcel of real estate described in said Act, and, without providing that the Company should have a definite capital stock, enacted:

"That the corporate property shall be divided into shares not exceeding six hundred in number, as the said corporation may find to be most expedient; and the said shares shall be divided among the several proprietors, according to the interest and portions which they may respectively have in said corporate property."

That the amendment of said charter, hereinbefore referred to, provided:

"That the said corporation may at any time when they deem it expedient increase their present number of shares by a number not exceeding four hundred and that said four hundred shares shall be held as the common property of the corporation, until they shall be either divided among the said fifty associates pro rata, according to the number of shares which said associates may at any time possess, or sold, or otherwise disposed of, in such manner as said associates may hereafter determine."

6 That the original charter of said Company was granted to it by the State of Massachusetts without any reservation to the State of the right or power to amend, alter or repeal the same, and, for that reason, your orator alleges, on information and belief, that the said charter and franchise of the defendant, Fifty Associates, is a contract right, granted to it by the State of Massachusetts.

That the share of the complainant is one of the one thousand shares into which the corporate property of said corporation is divided; that said share is without a par value, but the same has a market value of something in excess of \$4,000.00, and that the total valuation of the real estate of said defendant, Fifty Associates, as assessed by the City of Boston, is in excess of the total market value of its shares.

That the property of said corporation consists wholly of real estate or interest therein or leaseholds thereof, except such amounts of income as may from time to time have been set apart as surplus or reserved for working capital or such income as may have been accumulated but not declared in dividends.

That the business of said corporation, so far as it may be called a business, is the holding and managing of the property aforesaid, and such business is transacted and conducted wholly within the City of Boston, in said Commonwealth, and the income of said cor-

poration, except as the same may be derived from accumulated profits, is exclusively derived from real estate; and that, although empowered by its charter to buy and sell real estate and build, pull down and rebuild the same as a business, the said corporation is not engaged in the doing of the same as a business for profit nor is it so engaged at all, except in so far as the doing of the same may be an incident to the management of its property or the investment of its funds.

(7) That, under the laws of the Commonwealth of Massachusetts, three or more persons, by compliance with the provisions of a general law, may organize a corporation for any lawful purpose, except to buy or sell real estate; and your orator avers, on information and belief, that the laws of Massachusetts have never permitted the organization of corporations under a general law for the purpose of buying and selling real estate, but on, the contrary, have always limited the grant of corporate franchises for that purpose to special Acts of the Legislature; and that during the last twenty years not more than six corporations have been specially chartered by the Legislature to do a real estate business within the City of Boston; that, under the general law governing business corporations, such corporations have power only:

"To hold, purchase, convey, mortgage or lease within or without this Commonwealth such real or personal property as the purposes of the corporation may require."

that the right and franchise of the defendant, Fifty Associates, to buy, hold and sell real estate is a special franchise belonging to the defendant corporation, granted by special Act of the Legislature of Massachusetts; that there are comparatively few corporations in Massachusetts holding such special franchises or rights and that the same are now difficult to obtain; the principal business of the corporation under its charter is to acquire, hold, manage, lease, exchange and sell real estate in the City of Boston, and, as hereinbefore stated, its entire income is substantially rents, derived directly from such real estate.

(8) That the business of holding, managing and leasing real estate in large parcels in the City of Boston in competition with the defendant, Fifty Associates, and other like real estate corporations is largely conducted and carried on by so-called real estate trusts; such real estate trusts result generally from a conveyance of real estate to certain individuals as joint tenants, who thereupon execute a declaration of trust which declares a trust in favor of the holders from time to time of certain certificates for shares issued under said declaration by the Trustees; the declaration of trust defines and carefully limits the powers of the trustees in dealing with the trust property and it is usual for such deeds to provide that the trustees shall have no power to bind the shareholders personally and that no person dealing with the trustees shall have any claim or enforce any liability against the property of any trustee or any shareholder in their individual capacity, but all such claims and liabilities shall be enforced only against the trust estate.

Your orator alleges, on information and belief, that real estate possessed at more than \$75,000,000.00 is held in the City of Boston by such real estate trusts; that their shares are quoted publicly from time to time in financial papers, and, although not traded in on the exchanges, find a ready and open market in the City of Boston; that they are traded in in substantially the same way and the certificates and shares are transferred in substantially the same way as shares of the defendant, Fifty Associates, and other corporations which are not listed on the stock exchanges.

Your orator further alleges that, under this form of trust agreement, a large business in holding, managing and leasing real estate in competition with the defendant, Fifty Associates, and other similar corporations is carried on in the City of Boston, and, as your orator is informed and believes, with limited liability on the part of the shareholders of said trusts; the said trusts are not created or authorized by any general or special law or Statute of the Commonwealth of Massachusetts.

(9) That the net income or proceeds of the defendant corporation for the year ending December 31, 1909, is largely in excess of the sum of \$5,000.00, after deducting from the gross amount of its income all expenses, charges, losses not compensated by insurance, reasonable allowances for depreciation, interest and taxes paid out of, or allowed against, such income during said year, and does not include amounts, if any, received by it within the year as dividends upon stock of other corporations, joint stock companies or associations or insurance companies; that the said defendant corporation is not a labor, agricultural or horticultural, or fraternal beneficiary society or association, nor a building and loan association, nor is it organized and operated exclusively for religious, charitable or educational purposes.

(10) That a majority of the said Board of Directors claims and asserts that the said defendant, Fifty Associates, is subject to the provisions of an Act of Congress of the United States, entitled:—"An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for other Purposes," and approved August 5, 1909, and that, under and by virtue of the alleged authority of the provisions of Section thirty-eight of the said Act of Congress of the United States, the defendant, Fifty Associates, shall be liable to make, on or before the first day of March, 1910, a true and accurate return under oath or affirmation of its President, Vice-President or other principal officer, and its Treasurer, or Assistant-Treasurer, to the Collector of Internal Revenue for the Third District of Massachusetts, setting forth:—

10 (a) The total amount of the paid up capital stock of the Fifty Associates outstanding on December 31, 1909.

(b) The total amount of the bonded and other indebtedness of the Fifty Associates on December 31, 1909.

(c) The gross amount of the income of the Fifty Associates received by it from all sources during the year ending December 31, 1909; also the amount received by the Fifty Associates within the said year by way of dividends upon stock of such corporations.



joint stock companies or associations, or insurance companies, as may be subject to the tax imposed.

(d) The total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of the Fifty Associates within the year ending December 31, 1909, stating separately all charges, such as rentals or franchise payments required to be made as a condition to the continued use or possession of property.

(e) The total amount of all losses actually sustained by the Fifty Associates during the year ending December 31, 1909, and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, if any.

(f) The amount of interest actually paid by the Fifty Associates within the year ending December 31, 1909, on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding its paid up capital stock outstanding at the close of the year 1909.

(g) The amount paid by the Fifty Associates within the year ending December 31, 1909, for taxes imposed under the authority of the United States or of the State of Massachusetts.

(h) The net income of the Fifty Associates after making the deductions authorized in Section thirty-eight of the said Act of Congress, above mentioned.

and, on or before the first day of March in each year thereafter, a like return in respect to the year ending with the thirty-first day of December preceding; and shall be liable to pay, on or before the thirtieth day of June, A. D., 1910, and of each year thereafter, an assessment described in said Act as a special excise tax with respect

11 to the carrying on or doing business by the said corporation equivalent to one per centum upon its entire net income, as ascertained in the way provided for in said Act, and set out in said return required to be made.

(11) Your orator further shows that, pursuant to the terms of said Act, the said return or returns, if made, and the returns of other corporations, if made, shall, as received by the Collector of Internal Revenue, be transmitted forthwith by the Collector to the Commissioner of Internal Revenue; that all such returns shall be retained by the Commissioner of Internal Revenue, who shall make assessment thereon on or before the first day of June, 1910, and of each year thereafter, and that, when the assessment is so made, all of the said returns, including that of the defendant corporation, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

(12) That your orator is informed and believes, and, therefore, avers, that said so-called real estate trusts are not subject to said provisions of Section thirty-eight of said Act of Congress, approved August 5, 1909, and that accordingly no returns or disclosures will be required to be made by such real estate trusts of the facts relating to their income and business, while, on the other hand, such Act, if constitutional and applicable to the defendant, Fifty Associates, will require it to disclose and make public statements relating to its

income and business, all to the manifest injury of the defendant, Fifty Associates, and to the prejudice and irreparable injury of your orator and other shareholders of the defendant, Fifty Associates, and to the advantage of said real estate trusts and the shareholders thereof.

(13) And your orator avers that the provisions of said Section thirty-eight of said Act of Congress, above referred to, providing for the laying of a special excise tax upon every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, with respect to the carrying on or doing business by such corporation, joint stock company or association, equivalent to one per centum (1%) upon the entire net income of each, over and above \$5000.00, are as to the said defendant, Fifty Associates, a corporation, deriving its income wholly from real estate, unconstitutional, null and void for divers reasons and in divers respects, of which your complainant shows the following:—

(a) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section seven, in that the said Act above mentioned originated in the Senate of the United States, and was concurred in by the House of Representatives subsequently thereto, whereas it is required by said Article and Section of the Constitution of the United States that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

(b) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Sections two and nine, in that the tax imposed by the said Act, although described in said Act as a special excise tax, is in fact and in legal effect a direct tax and is not apportioned among the several States, according to their respective numbers, whereas it is required by the said Article and Sections of the Constitution that no direct tax shall be laid by Congress, unless in proportion to the census.

(c) That, if the tax imposed by the said Act of Congress is not a direct tax, then the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section eight thereof, in that the tax imposed thereby is not uniform throughout the United States, in this that the said Act of Congress exempts from the payment of said tax all corporations, joint stock companies or associations having an annual net income of less than \$5000.00; and is not uniform throughout the United States in this that said Act exempts from the making of the return therein prescribed and from the payment of the tax thereby imposed all labor, agricultural or horticultural organizations and fraternal beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations, and dependents of such members and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, and all corporations or as-

sociations organized and operated exclusively for religious, charitable or educational purposes, no part of the income of which inures to the benefit of any private stockholder or individual; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations having like charters and franchises and enjoying like benefits under the laws of the United States and the several States; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations carrying on and doing the same and equal business and enjoying the same rights and privileges in regard to the carrying on and doing of such business; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations organized for profit, but not having a capital stock divided into shares; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations having an annual net income exceeding \$5000.00, if said income is derived as dividends upon stock of corporations, joint stock companies or associations or insurance companies, subject to the tax thereby imposed; and is not uniform throughout the United States in this that the said Act exempts from the tax thereby imposed and from the making of returns thereby prescribed, individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit, whereby it is provided by said Article and Section of the Constitution of the United States that Congress shall have power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the general welfare of the United States, but that all duties, imposts and excises shall be uniform throughout the United States.

(d) That the said Act of Congress is in violation of the Constitution of the United States, and more particularly of the provisions of the Fifth Amendment thereto, in that under the provisions of the said Act the defendant corporation will be deprived of its property,

14 without due process of law, and particularly in this that, through the publicity of its business, the privacy of its affairs will be largely, if not entirely, destroyed, and its competitors will be able to gain an intimate knowledge of what have hitherto been the private affairs and concerns of the defendant corporation, while corresponding publicity of the private affairs and concerns of all other corporations, joint stock companies or associations will not necessarily result, nor will any corresponding publicity of the private affairs and concerns of individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit result; and in this that the said assessment if made will be laid upon the defendant corporation and not necessarily upon all other corporations, joint stock companies or associations, and not at all upon individuals, firms, co-partnerships and trusts, similar to

those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, even though they may be engaged in the carrying on or doing of the same or similar business, whereas it is provided by the Fifth Amendment to the Constitution that no person shall be deprived of his property without due process of law.

(e) That the said Act of Congress is in further violation of the Fifth Amendment to the Constitution, in that under the provisions of said Act the private property of the defendant corporation will be taken for public use without just compensation and without any compensation whatsoever, and especially in this that the private affairs, books, papers, records, business and trade-secrets of the defendant corporation and the contents of its books, papers and records are to be taken for publication and are to be given to the Collector of Internal Revenue and to the Commissioner of Internal Revenue and to the public in the form of public records, whereas it is provided by the Fifth Amendment to the Constitution that private property shall not be taken for public use without just compensation.

(f) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of the provisions of the Fourth Amendment thereto, in that it violates the rights of the defendant corporation to be secure in its papers, effects, books, records, business, private affairs and trade-secrets against unreasonable searches and seizures, in this that by the provisions of said Act should the defendant corporation by its officers fail, neglect or refuse to make the return therein provided for the Commissioner of Internal Revenue is thereupon empowered to examine through any regularly appointed Revenue Agent all books and papers bearing upon  
15 the matters required to be included in the return and to make up a return therefrom, whereas it is provided by the Fourth Amendment to the Constitution that the right of the people to be secure in their papers and effects against unreasonable searches and seizures shall not be violated.

(g) That the said Act of Congress is in violation of the Constitution of the United States, in this that the requirement to make said return for public record and the requirement to pay said tax and the depriving thereby of the defendant corporation of its property without due process of law and the taking thereby of the private property of the defendant corporation for public use without just compensation, and the violation thereby of the right of the defendant corporation to be secure in its papers and effects against unreasonable searches and seizures, all as hereinbefore set forth, are burdens upon the charter and franchise of the defendant corporation, Fifty Associates, granted as aforesaid by the State of Massachusetts, and upon the right and power of the State of Massachusetts to grant, maintain and preserve the same to the defendant corporation and are an invasion and burden upon a prerogative, power, instrumentality and function of sovereignty belonging to the State of Massachusetts and which were never agreed to either expressly or by implication by the State of Massachusetts or by the people of the State of Massachusetts at the time the said State was admitted into the Union or before or since that time.

(h) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of the Tenth Amendment thereto, in this, that the carrying on or doing of business for profit by a corporation, joint stock company or association created under the laws of the several States is not within the taxing power of the United States, and, any Act of Congress which by its terms imposes a tax upon the carrying on or doing of business for profit by any such corporation, joint stock company or association, imposes a burden and a tax upon and is an interference with the free exercise by the several States of the powers expressly reserved by the said States to charter and incorporate corporations and to grant charters and franchises to such corporations.

(i) That the said Act of Congress is not a proper exercise of the legislative power granted to Congress and that the said Act of Congress is otherwise in violation of the Constitution of the United States.

Wherefore, and, in consideration whereof and forasmuch  
16 as your orator is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, your orator prays:

(1) That it may be adjudged and decreed that the said provisions of the said Act of Congress, approved August 5, 1909, so far as the same relate to a tax upon your orator, are unconstitutional, null and void.

(2) That the defendant company, its officers and agents and the individual defendants be enjoined and restrained *pendente lite* from voluntarily making the said return or paying the said tax or otherwise complying with the provisions of said Act.

(3) That the said defendants may be perpetually restrained as aforesaid.

(4) That your orator may have such other or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make, to the best and utmost of their knowledge, remembrance, information and belief, the said Fifty Associates, under its corporate seal, and the said individual defendants, not under oath (an answer under oath being hereby expressly waived) to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto; may it please your Honors to grant unto your orator a subpoena *ad respondendum* issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch, commanding them and each of them on a day certain and under a certain penalty to be therein inserted to appear before your Honors in this Honorable Court and  
17 then and there full, true, direct and perfect answer make to all and singular the premises; and further to perform and

bide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional injunction and a writ of perpetual injunction to the same purport and effect as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

CHARLES H. TYLER,  
OWEN D. YOUNG,  
RANDOLPH FROTHINGHAM,  
*Solicitors for Complainant.*

UNITED STATES OF AMERICA,  
*District of Massachusetts:*

Charles H. Tyler, being duly sworn, deposes and says: that he is one of the solicitors for the complainant, George Wendell Phillips, named in the foregoing bill of complaint; that the reason why this verification is not made by said Phillips is because he is absent from the State and District of Massachusetts; that deponent has read said bill and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

CHARLES H. TYLER.

Subscribed and sworn to before me this eighth day of February,  
A. D., 1910.

[SEAL.]

RANDOLPH FROTHINGHAM,  
*Notary Public.*

18

"EXHIBIT A."

BOSTON, February 2, 1910.

To Fifty Associates and the Board of Directors thereof, Boston, Mass.

DEAR SIRS: Mr. George Wendell Phillips, a stockholder in your corporation, having taken our counsel, has been advised by us that the provisions of the United States Corporation Tax Law, the same being Section 38 of the Tariff Act of 1909, may be, as far as the same may relate to the Fifty Associates, unconstitutional, null and void.

Mr. Phillips is informed that the Directors and Officers of the said corporation, believing the said Act to be constitutional and the Fifty Associates subject thereto, intend fully to comply with the terms thereof and make such return and pay such tax assessed, if any, as are therein provided for.

To make a return requiring the detailed business of the Fifty Associates will be to do an irreparable injury to the corporation, its business and its stockholders.

Therefore, Mr. Phillips, through his counsel, protests against your compliance with the terms of said Act; protests against your permitting the return to be made or the tax assessed to be paid, as provided by said Act, and requests that you will not voluntarily make and file the return or pay the tax, if any is assessed; and



further requests that, for the best interests of the corporation and for the protection of its business and its stockholders, you will contest by proper means the constitutionality of the said Act, which requires by its provisions the making and filing of such a return and the payment of the tax assessed thereon.

Very truly yours,  
(Signed)

TYLER & YOUNG.

"EXHIBIT B."

BOSTON, MASS., *February 2, 1910.*

Messrs. Tyler & Young, Ames building, Boston, Mass.

DEAR SIR: Replying to your request, in behalf of Mr. George Wendell Phillips, a stockholder of the Fifty Associates, that no return be made or taxes paid by the Fifty Associates under the Federal Corporation Tax Act, I beg to enclose a copy of the votes of the Board of Directors of the Fifty Associates, denying the request.

Very truly yours,  
(Signed)

CHARLES E. COTTING,  
*Clerk, Fifty Associates.*

(*Enclosure to Above Letter.*)

Boston, *February 2, 1910.*

I hereby certify that at a meeting of the Directors of Fifty Associates, held today, a majority of the Directors being present, the following votes were passed:

*Voted*, That the Clerk of this corporation be, and he hereby is, authorized and directed to make reply to the letter bearing date of February 2, 1910, addressed to the Fifty Associates and the Board of Directors thereof and signed by Messrs. Tyler & Young, attorneys for George Wendell Phillips, and that such reply shall state that this Board is not confident that the act of Congress referred to is constitutional, but that the penalties imposed by the terms of said Act for the failure, refusal or neglect to make the return as therein provided are, in the opinion of this Board, so severe that it would be a dangerous thing to incur the imposing of them.

And be it further:

21 *Voted*, That in the event of further protest or request being made of this corporation or its Board of Directors by any other of its stockholders relative to action in regard to said so-called corporation tax law, the Clerk of this Board be, and he hereby is, authorized and directed to answer such inquiry or inquiries by advising said stockholder or stockholders of the action hereby taken.

And be it further:

*Voted*, That the President and Treasurer of this corporation be, and they are hereby, authorized and directed, in view of the foregoing votes, to make in the name and behalf of this corporation

the necessary returns required by Section 38 of the Tariff Act of 1909, imposing the tax on corporate income and thereafter if a tax be assessed upon such return or otherwise the Treasurer of the corporation is authorized to pay said tax under protest and take such proceedings as he may be advised by counsel are necessary to recover the same in case said assessment is determined to be illegal.

Attest:

(Signed)

CHAS. E. COTTING, *Clerk.*

22 On the ninth day of February, A. D. 1910, the following Demurrer is filed:

*Demurrer.*

(Filed Feb. 9, 1910.)

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill. And, for causes of demurrer, show:

*First.* That said bill doth not contain any matter of equity whereon this Court can ground any decree or give to the complainant any relief against these defendants or any one or more of them.

*Second.* That it appeareth by the complainant's own showing by the said bill that he is not entitled to the relief prayed for in the bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants separately and severally demur thereto and pray the judgment of this Honorable Court whether they, or any one of them, shall be compelled to make any answer to said bill; and they humbly pray to be hence dismissed, with their reasonable costs in this behalf sustained.

H. HUESTIS NEWTON,  
*Solicitor for Defendants.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

H. HUESTIS NEWTON,  
*Solicitor for Defendants.*

23 UNITED STATES OF AMERICA,  
*District of Massachusetts:*

I, Charles E. Cotting, being duly sworn, depose and say: I am one of the above named defendants. The foregoing demurrer is not interposed for purpose of delay.

CHAS. E. COTTING.

Sworn to, before me, this ninth day of February, 1910.

[SEAL.]

ARTHUR N. MADDISON,  
*Notary Public.*



Thereupon this cause is set down for hearing on demurrer and is fully heard by the Court, the Honorable Le Baron B. Colt, Circuit Judge, sitting, said demurrer being sustained by the Court, on the eleventh day of February, A. D. 1910.

On the same day, the following Final Decree was entered:

24

*Final Decree.*

February 11, 1910.

COLT, J.:

This cause having come on to be heard upon the bill and the demurrer thereto, it is hereby ordered and decreed that the said demurrer be sustained and that the bill of complaint above named be, and the same is hereby dismissed, with costs.

By the Court:

CHARLES K. DARLING, *Clerk.*

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

*Judge's Certificate on Claim for Appeal.*

Thereupon the above named complainant states that in this case the constitutionality of a law of the United States is drawn in question, and in open Court prays an appeal from said final decree direct to the Supreme Court of the United States, pursuant to the Statute in such case made and provided. It is, therefore, further ordered that the said appeal be, and the same is, hereby allowed as prayed for in open Court.

The said defendants then admitted in open Court due notice of the said appeal and duly waived service of any citation thereon.

LE BARON B. COLT,  
*U. S. Circuit Judge.*

25

*Assignment of Errors.*

(Filed February 11, 1910.)

And now comes the complainant above named by Tyler & Young, his solicitors, and, in connection with the complainant's petition of appeal from the final decree made and entered herein on the eleventh day of February, 1910, dismissing the complainant's bill of complaint with costs, makes and files the following assignment of errors, in pursuance of the Statute and rule in such case made and provided:

I. That the Court erred in not holding that so much of the Act of Congress of the United States, entitled: "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes," approved August 5, 1909, as relates to the assessment and collecting of a tax on the net income of corporations

and the filing of returns of corporations, as specified in Section thirty-eight of the said Act, was unconstitutional, null and void, in that:

(a) The said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section seven, in that the said Act above mentioned originated in the Senate of the United States, and was concurred in by the House of Representatives subsequently thereto, whereas it is required by said Article and Section of the Constitution of the United States that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

(b) The said Act of Congress is in violation of the Constitution of the United States, and particularly Article one, Sections two and nine, in that the tax imposed by the said Act, although described in said Act as a special excise tax, is in fact and in legal effect a direct tax and is not apportioned among the several States, according to their respective numbers whereas it is required by the said Article and Sections of the Constitution that no direct tax shall be laid by Congress, unless in proportion to the census.

26 (c) If the tax imposed by the said Act of Congress is not a direct tax, then the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section eight thereof, in that the tax imposed thereby is not uniform throughout the United States, in this that the said Act of Congress exempts from the payment of said tax all corporations, joint stock companies or associations having an annual net income of less than \$5000.00; and is not uniform throughout the United States in this that said Act exempts from the making of the return therein prescribed and from the payment of the tax thereby imposed all labor, agricultural or horticultural organizations and fraternal beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations, and dependents of such members and domestic building and loan associations organized and operated exclusively for the mutual benefit of

27 their members, and all corporations or associations organized and operated exclusively for religious, charitable or educational purposes, no part of the income of which inures to the benefit of any private stockholder or individual; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations having like charters and franchises and enjoying like benefits under the laws of the United States and the several States; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations carrying on and doing the same and equal business and enjoying the same rights and privileges in regard to the carrying on and doing of such business; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations organized for profit, but not having a capital stock divided into shares; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations hav-

ing an annual net income exceeding \$5000.00, if said income is derived as dividends upon stock of corporations, joint stock companies or associations or insurance companies, subject to the tax thereby imposed; and is not uniform throughout the United States in this that the said Act exempts from the tax thereby imposed and from the making of returns thereby prescribed, individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit, whereby it is provided by said Article and Section of the Constitution of the United States that Congress shall have power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the general welfare of the United States, but that all duties, imposts and excises shall be uniform throughout the United States.

(d) The said Act of Congress is in violation of the Constitution of the United States, and more particularly of the provisions of the Fifth Amendment thereto, in that under the provisions of the said Act, the defendant corporation will be deprived of its property, without due process of law, and particularly in this that, through the publicity of its business, the privacy of its affairs will be largely, if not entirely, destroyed, and its competitors will be able to gain an intimate knowledge of what have hitherto been the private affairs and concerns of the defendant corporation, while corresponding publicity of the private affairs and concerns of all other corporations, joint stock companies or associations will not necessarily result, nor will any corresponding publicity of the private affairs and concerns of individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit result; and in this that the said assessment if made will be laid upon the defendant corporation and not necessarily upon all other corporations, joint stock companies or associations, and not at all upon individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, even though they may be engaged in the carrying on or doing of the same or similar business, whereas it is provided by the Fifth Amendment to the Constitution that no person shall be deprived of his property without due process of law.

(e) The said Act of Congress is in further violation of the Fifth Amendment to the Constitution, in that under the provisions of said Act the private property of the defendant corporation will be taken for public use without just compensation and without any compensation whatsoever, and especially in this that the private affairs, books, papers, records, business and trade-secrets of the defendant corporation and the contents of its books, papers and records are to be taken for publication and are to be given to the Collector of Internal Revenue and to the Commissioner of Internal Revenue and to the public in the form of public records, whereas it is provided

by the Fifth Amendment to the Constitution that private property shall not be taken for public use without just compensation.

(f) The said Act of Congress is in violation of the Constitution of the United States, and particularly of the provisions of the Fourth Amendment thereto, in that it violates the rights of the defendant corporation to be secure in its papers, effects, books, records, business, private affairs and trade-secrets against unreasonable searches and seizures, in this that by the provisions of said Act should the defendant corporation by its officers fail, neglect or refuse to make the return therein provided for the Commissioner of Internal Revenue is thereupon empowered to examine through any regularly appointed Revenue Agent all books and papers bearing upon

29 the matters required to be included in the return and to make up a return therefrom, whereas it is provided by the Fourth Amendment to the Constitution that the right of the people to be secure in their papers and effects against unreasonable searches and seizures shall not be violated.

(g) The said Acts of Congress is in violation of the Constitution of the United States, in this that the requirement to make said return for public record and the requirement to pay said tax and the depriving thereby of the defendant corporation of its property without due process of law and the taking thereby of the private property of the defendant corporation for public use without just compensation, and the violation thereby of the right of the defendant corporation to be secure in its papers and effects against unreasonable searches and seizures, all as hereinbefore set forth, are burdens upon the charter and franchise of the defendant corporation, Fifty Associates, granted as aforesaid by the State of Massachusetts, and upon the right and power of the State of Massachusetts to grant, maintain and preserve the same to the defendant corporation and are an invasion and burden upon a prerogative, power, instrumentality and function of sovereignty belonging to the State of Massachusetts and which were never agreed to either expressly or by implication by the State of Massachusetts or by the people of the State of Massachusetts at the time the said State was admitted into the Union or before or since that time.

(h) The said Act of Congress is in violation of the Constitution of the United States, and particularly of the Tenth Amendment thereto, in this, that the carrying on or doing of business for profit by a corporation, joint stock company or association created under the laws of the several States is not within the taxing power of the United States, and, any Act of Congress which by its terms imposes a tax upon the carrying on or doing of business for profit by any such corporation, joint stock company or association, imposes a burden and a tax upon and is an interference with the free exercise by the several States of the powers expressly reserved by the said States to charter and incorporate corporations and to grant charters and franchises to such corporations.

(i) The said Act of Congress is not a proper exercise of the legislative power granted to Congress and that the said Act of Congress is otherwise in violation of the Constitution of the United States.

- 30 II. That the Court erred in not granting to the complainant relief prayed in and by his bill or any part thereof.  
 III. That the Court erred in sustaining the demurrer to said bill.  
 IV. That the Court erred in dismissing the said bill with costs.

CHARLES H. TYLER,  
 OWEN D. YOUNG,  
 RANDOLPH FROTHINGHAM,  
*Solicitors for Complainant.*

Dated, Boston, Massachusetts, February 11th, 1910.

Approved:

LE BARON B. COLT,  
*U. S. Circuit Judge.*

31

*Bond on Appeal.*

(Filed and Approved Feb. 11, 1910.)

Know all Men by these Presents, That we, George Wendell Phillips, of Reno, in the State of Nevada, as principal, and American Bonding Company of Baltimore, a corporation organized under the laws of the State of Maryland, and having a usual place of business in Boston, in the County of Suffolk and Commonwealth of Massachusetts, as surety, are held and firmly bound unto Fifty Associates, a Massachusetts corporation, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch in the full and just sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch their certain attorneys, successors, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eleventh day of February in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts in a suit in Equity depending in said Court between George Wendell Phillips, complainant, and Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter, and Francis C. Welch, defendants, a decree was entered against the said George Wendell Phillips and the said George Wendell Phillips having obtained in open court an appeal to remove said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch citing and admonishing them to be and appear in the said Supreme Court of the United States, in the city of Washington, in the District of Columbia, on the sixteenth day of February, A. D. 1910.

Now, the condition of the above obligation is such, That if the said George Wendell Phillips shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE WENDELL PHILLIPS,  
By TYLER & YOUNG, *His Att'ys.*  
AMERICAN BONDING COMPANY, [SEAL.]  
By JAMES R. CHANDLER, *Vice Pres't.*

Attest:

MARY E. MOLSON, *Ass't Sec'y.*

Sealed and delivered in presence of

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\_\_\_\_\_  
\_\_\_\_\_

Approved:

LE BARON B. COLT,  
*U. S. Circuit Judge.*

32

*Citation on Appeal.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to Fifty Associates, a corporation, organized and existing under the laws of the State of Massachusetts, and having its principal office and place of business in Boston, in that State, a citizen of the State of Massachusetts; Charles W. Amory, of said Boston, a citizen of the State of Massachusetts; Charles E. Cotting, of said Boston, a citizen of the State of Massachusetts; Charles F. Adams, 2nd, of Concord, a citizen of the State of Massachusetts; Francis I. Amory, of said Boston, a citizen of the State of Massachusetts; Philip Dexter, of said Boston, a citizen of the State of Massachusetts; and Francis C. Welch, of said Boston, a citizen of the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the\* sixteenth day of February next, pursuant to an Appeal duly obtained from a decree of the Circuit Court of the United States for the District of Massachusetts wherein George Wendell Phillips, a citizen of the State of Nevada and a resident of Reno, in said State, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Judge of the Circuit Court of the United States for the District of Massachusetts this

eleventh day of February, in the year of our Lord one thousand nine hundred and ten.

LE BARON B. COLT,  
*U. S. Circuit Judge.*

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\*Not exceeding 30 days from the day of signing.

†Name of Court in which the Decree is entered.

33

*Clerk's Certificate.*

UNITED STATES OF AMERICA,  
*District of Massachusetts, ss:*

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 682, George Wendell Phillips, Complainant, v. Fifty Associates et al., Defendants, in said Circuit Court determined, Judge's Certificate on Claim for Appeal, the Assignment of Errors, the Bond on Appeal, and also the original Citation issued upon the appeal of the complainant in said cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this fourteenth day of February, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,023. Massachusetts C. C. U. S. Term No. 797. George Wendell Phillips, appellant, vs. Fifty Associates et al. Filed February 16, 1910. File No. 22,023.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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**No. 797.**

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GEORGE WENDELL PHILLIPS, APPELLANT,

*v.*

FIFTY ASSOCIATES, CHARLES W. AMORY,  
CHARLES E. COTTING, CHARLES F. ADAMS, 2ND,  
FRANCIS I. AMORY, PHILIP DEXTER, AND  
FRANCIS C. WELCH.

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ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF MASSACHUSETTS.

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## **MOTION TO ADVANCE UNDER RULE 26.**

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*To the Honorable the Chief Justice and the Associate Justices  
of the Supreme Court of the United States:*

Comes now George Wendell Phillips, appellant herein,  
and respectfully prays this Honorable Court that the above  
entitled cause may be advanced upon the docket of this  
court and set down for oral argument on the 14th day of  
March next, together with the cause of Flint *vs.* Stone Tracy



Company *et al.*, No. 747, and other causes assigned therewith involving the constitutionality of that part of an act of Congress, approved August 5, 1909, commonly known as the Federal Corporation Tax Law, for the reasons that will be made to appear hereafter.

## I.

That this suit is one of a civil nature cognizable in equity; that this suit arises under the Constitution of the United States and under the laws thereof; that this suit is a controversy between citizens of different States and the matter in dispute exceeds, exclusive of interest and costs a sum or value of \$2,000; and that this suit arises under the Internal Revenue Laws of the United States.

## II.

The appellant, George Wendell Phillips, a citizen of the State of Nevada and a stockholder in the defendant corporation, Fifty Associates, organized and existing under the laws of the State of Massachusetts, has brought this bill in his own behalf (and in behalf of all other stockholders who are similarly situated and who shall be entitled to avail themselves of the benefit thereof) against the defendant corporation, Fifty Associates, its officers and directors, alleging that the defendants in compliance with the provisions of the said act of Congress entitled, "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," intend to make the required return and also intend voluntarily to pay the tax if any shall be assessed upon such part of its net income as shall be in excess of \$5,000. The bill alleges that the provisions of said act of Congress which purport to require the making of such return and the payment of such tax are unconstitutional, null and void, and the appellant seeks therein to restrain the intended voluntary compliance by the defendants with the provisions of said act.

## III.

In brief, the bill alleges that the defendant corporation was incorporated by special act of the legislature of the State of Massachusetts, approved February 21, 1820, and by virtue of said act has full power to possess, purchase, sell, improve, and manage real, leasehold, or other estate; that by said special act a charter was granted to the said Fifty Associates without any reservation to the State of Massachusetts of a right or power to amend, alter or repeal the same, which said charter thereby constitutes a contract right granted by said State to said defendant corporation; that the property of said defendant is divided into 1,000 shares without par value, and consists wholly of real estate or interest therein, or leaseholds thereof, and the income therefrom, except as the same may be derived from accumulated profits, is exclusively derived from real estate; that the business of said corporation, so far as it may be called a business, is the holding and managing of its said property and that such business is transacted and conducted wholly within the city of Boston in said State; that under the general laws of the State of Massachusetts a corporation may not be organized for the purpose of buying and selling real estate; that the granting of corporate franchises for that purpose has always been limited to special acts of the legislature; that the business of holding, managing and leasing real estate in large parcels in the city of Boston in competition with the defendant Fifty Associates is largely conducted and carried on by so-called real estate trusts, and the appellant alleges that real estate in the city of Boston, assessed at more than \$75,000,000, is held by such real estate trusts, and further alleges that he is informed and believes that such so-called real estate trusts, although having transferable shares, traded in substantially as are those of the defendant, and with limited liability on the part of the holders thereof, the same not being organized under any general or special law, are not subject to said provisions of said act of Congress above referred to,

and that consequently the real estate trusts, the competitors of the defendant corporation, Fifty Associates, are not to be required to make returns and disclosures relative to their income and business, while the provisions of said act, if constitutional and applicable to the defendant Fifty Associates, will require it to disclose and make public statements relative to its income and business, all to the manifest injury of the defendant Fifty Associates and to the prejudice and irreparable injury of the appellant and other shareholders of the defendant Fifty Associates.

#### IV.

Defendants filed a general demurrer to this bill and the cause having come on to be heard upon the bill and demurrer thereto in the United States Circuit Court for the District of Massachusetts the demurrer was sustained, the bill was dismissed and an appeal to this court was brought and allowed.

#### V.

The questions of law involved herein are of great public interest and importance and arise under a revenue law of the United States, and unless the adjudication of this Honorable Court as to the constitutionality of the law in question is speedily obtained this and other corporations will be obliged to file their returns and pay the tax assessed, if any, under protest, with a resultant multiplicity of suits.

#### VI.

The bill alleges that the provisions of section 38 of the said act, above referred to as the Federal Corporation Tax Law, are in violation of the provisions of the Constitution of the United States and are null and void for the following reasons:

(1) That the said tax provisions of said act, the same providing for an entirely distinct and independent source of revenue, originated in the Senate of the United States, and is not germane to any of the revenue provisions of said act originating in the House of Representatives, as is required by article 1, section 7, of the Constitution.

(2) That said section 38 of the said act provides for a direct tax, which is not apportioned among the several States in proportion to the census, as is required by article 1, sections 2 and 9, of the Constitution.

(3) That if the said section of said act be held not to provide for a direct tax, but to impose a special excise tax, then the said act by its provisions is in divers respects not uniform throughout the States, as is required by article 1, section 8, of the Constitution.

(4) That the said section of said act is in violation of the Fifth Amendment to the Constitution of the United States in that under the provisions of the said section the defendant corporation will be deprived of its property without due process of law and the private property of the defendant corporation will be taken for public use without just compensation.

(5) That the said section of said act by its terms violates the right of the said corporation to be secure in its papers and effects against unreasonable searches and seizures, as is secured to it by the Fourth Amendment to the Constitution.

(6) That the said section of said act by its terms is an invasion of, and a burden upon, the reserved rights of the State of Massachusetts, as are secured to it by the Tenth Amendment to the Constitution.

## VII.

The appellant is informed that in the cause of Flint *vs.* Stone Tracy Company *et al.*, and in other like causes which have already been advanced for hearing, the constitutionality of the said Corporation Tax Law is involved, but your appellant is informed and believes and therefore avers that the questions raised by him in his bill of complaint as aforesaid are in many respects different and distinct from those raised in the other causes.

Waiver of notice of this motion by counsel for the appellees has been filed with the clerk of this court. Notice of this motion has been given to the Attorney General of the United States and to the Solicitor General of the United States.

Respectfully submitted.

A. R. SERVEN,  
BARRY MOHUN,  
B. E. EAMES,

*Of Counsel for Appellants.*

WASHINGTON, *February* 19, 1910.

